

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 10, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP2849-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 2008CF1146

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MATTHEW G. SCOTT,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Waukesha County:  
KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Matthew Scott appeals from an order denying his postconviction motion to withdraw his guilty plea.<sup>1</sup> Scott was convicted of

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<sup>1</sup> We affirmed Scott's judgment of conviction in his prior direct appeal, *State v. Scott*, No. 2010AP370-CR, unpublished slip op. (WI App June 8, 2011).

second-degree sexual assault of a child by sexual contact. We affirm the circuit court's refusal to permit Scott to withdraw his guilty plea.

¶2 In *State v. Scott*, No. 2010AP370-CR, unpublished slip op. (WI App June 8, 2011), we reversed and remanded for an evidentiary hearing on Scott's postconviction motion to withdraw his guilty plea. Scott alleged the following defect in the plea colloquy:

Scott's postconviction motion alleged that the plea colloquy was defective because he was not advised of the sexual contact element and he did not understand that element when he pled guilty. Scott alleged that he would not have pled guilty had he known that the State had to prove beyond a reasonable doubt that he intentionally touched the victim with the purpose of becoming sexually aroused or gratified or to sexually degrade or humiliate the victim. For these reasons, Scott moved to withdraw his guilty plea.

*Id.*, ¶6.

¶3 At the postconviction motion hearing, Scott's trial counsel, Jonathan LaVoy, testified that in the course of his representation, he evaluated the nature of Scott's conduct and discussed with him whether his conduct constituted sexual contact as defined in WIS. STAT. § 948.01(5)(a) (2011-12).<sup>2</sup> He and Scott discussed that they would seek dismissal of count one of the complaint because the facts did not satisfy the element of sexual contact. Although the jury

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Sexual contact includes "intentional touching, whether direct or through clothing, if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." WIS. STAT. § 948.01(5)(a). In a charge of sexual assault by sexual contact, the purpose of the sexual contact is an element of the offense. *State v. Jipson*, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18.

instructions appended to the plea questionnaire did not include a definition of sexual contact, counsel testified that he discussed the concept of sexual contact with Scott as part of reviewing the plea offer and completing the plea questionnaire. Counsel testified that he explained to Scott that the sexual contact had to be for the purpose of sexual arousal or gratification as distinguished from horseplay or accidental touching. Counsel believed that Scott understood the definition of sexual contact prior to the plea hearing. Scott did not tell counsel that he did not understand the statutory definition of sexual contact.

¶4 On cross-examination, counsel conceded that Scott did not function at the level one would expect of a twenty-two-year-old man. Counsel conceded that at the plea hearing, Scott initially stated that it was a mistake to have touched the victim's breasts. The circuit court engaged Scott in a colloquy designed to probe this response, and Scott then conceded that he intentionally touched the victim's breasts. Trial counsel's view of this colloquy was that Scott's "mistake" comment was an attempt to apologize and acknowledge that his conduct was wrong. Scott was not claiming that he accidentally or mistakenly touched the victim's breasts.

¶5 Scott's father, Ray, testified that his son has reading and verbal communication disabilities along with comprehension problems. He testified that he attended the plea offer meeting, and counsel never defined sexual contact in his presence.

¶6 Scott testified that even though he did not understand some matters relating to the plea agreement and the plea questionnaire, he did not ask any questions of his counsel, and he did not tell his counsel he did not understand. Scott testified that he did not understand the definition of sexual contact when he

reviewed the plea questionnaire with his counsel. Scott wanted the benefit of the plea agreement, which called for dismissing and reading in other charges. As Scott testified postconviction, he just wanted to enter a plea, and he did not ask any questions. Scott recalled discussing with counsel that he would seek dismissal of count one (touching the victim's buttocks) on the grounds that the touching was horseplay, not sexual contact under the statute.

¶7 The circuit court found that Scott was able to participate meaningfully in the plea colloquy. The court found that Scott's "mistake" remark was an admission that Scott erred in his conduct, not a suggestion that he lacked the intent to gratify, arouse, degrade or humiliate required for the element of sexual contact. The court found credible trial counsel's description of his meeting with Scott in which they discussed the plea agreement and plea questionnaire. The court found that the State met its burden to show that Scott entered his guilty plea knowingly, intelligently and voluntarily. The court denied Scott's motion to withdraw his guilty plea. Scott appeals.

¶8 Scott's motion to withdraw his guilty plea is governed by the standards for a postsentencing plea withdrawal. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Scott had to establish a manifest injustice requiring plea withdrawal. *See id.* An unknowing, involuntary and unintelligent plea constitutes a manifest injustice. *Id.* At the postconviction motion hearing, the State had the burden to establish that Scott knew and understood the information he should have received during the plea colloquy. *State v. Lackershire*, 2007 WI 74, ¶56, 301 Wis. 2d 418, 734 N.W.2d 23. The State may rely upon the totality of the evidence, including evidence outside the plea hearing record. *Brown*, 293 Wis. 2d 594, ¶40.

¶9 The credibility of the witnesses at the postconviction motion hearing was for the circuit court to decide. *State v. Michelle A.D.*, 181 Wis. 2d 917, 926, 512 N.W.2d 248 (Ct. App. 1994). If the circuit court did not expressly make a credibility finding about a witness, we assume it made implicit findings on credibility. *Jacobson v. American Tool Cos., Inc.*, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998). We defer to the circuit court’s opportunity to observe firsthand the witnesses’ demeanor and gauge the persuasiveness of their testimony. *Id.*

¶10 On appeal, Scott argues that his guilty plea was not knowingly, voluntarily and intelligently entered. Scott argues that trial counsel was not credible. The circuit court implicitly found trial counsel credible. Counsel testified that he reviewed the sexual contact element with Scott, Scott did not indicate he did not understand, and counsel understood Scott’s “mistake” remark to refer to the inadvisability of his conduct, not an attempt to negate the requisite intent. Clearly, the circuit court did not find either Scott or his father credible on the question of whether counsel discussed the definition of sexual contact with Scott and whether Scott understood this element at the time he entered his guilty plea. We accept the circuit court’s findings of fact.

¶11 Scott contends that the plea colloquy shows that Scott was not informed of the sexual contact element. Our analysis of the validity of Scott’s guilty plea goes beyond the plea hearing record. We also review the evidentiary hearing and the findings of the circuit court. On the record before this court, the State met its burden to show that Scott’s guilty plea was properly entered. Plea withdrawal was not warranted.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE  
809.23(1)(b)5.

